

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

March 28, 2005

N440
Charles H. Upshur
Sussex Correctional Institution
23203 DuPont Boulevard
P. O. Box 500
Georgetown, DE 19947

RE: Defendant ID No. 0207009470A (R1)

Dear Mr. Upshur:

I have had a chance to study your Motion for Postconviction Relief filed on March 15, 2005. I must inform you that it is denied.

Your first ground is that your attorney was ineffective in representing you. You argue that your attorney should have been able to introduce into evidence the results of a “field test” conducted by the police on a portion of the alleged drugs that were seized from you. You note that the “field test” was negative and thereby created a reasonable doubt as to all the testing done in your case on all the cocaine found in your possession or at your home or on your co-defendant.¹ Just because something is in a police report does not mean that it becomes evidence in a court of law. A “field test” is just that and the results of such a test by an officer are not admissible. The tests that are relied upon by the courts are those tests from the medical examiner's office or from a similar testing facility.

Your claim of ineffective assistance of counsel is based upon your belief that the “field test” would have been introduced into evidence had your attorney so moved, but you are mistaken. I can find no grounds to find your attorney ineffective for not moving to introduce the police report containing the negative “field test”. This ground is denied.

In Ground 2, you allege that there is an illegal sentence. This argument is difficult to follow but it would appear that you are stating that you should have been found guilty of having only 9.8 grams of cocaine as opposed to the 100 grams or more, which was the evidence at trial. You also

¹In your statement, you acknowledged the cocaine found on your girlfriend was yours.

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allege that instead of being sentenced for possession with the intent to deliver cocaine, you should have been sentenced to a "lesser offense" which you believe to be possession with the intent to deliver marijuana. Therefore, you ask this Court to correct the illegal sentences imposed.

After reviewing the statutes which were in effect at the time of your conviction, as well as the specific charges to which you were convicted, I am satisfied that the sentences imposed were required by law. This ground is denied.

In Ground 3, you allege that there was an illegal search of your property based upon information from an informant. While you do not factually develop this claim, I note that it is procedurally barred. Such a claim is required to be brought before the trial court so that it can be reviewed.² Since this issue has not been raised heretofore, you are required under Rule 61(i)(3) to establish cause for not raising the issue earlier and actual prejudice. Your only attempt at addressing the cause is that you claim that your trial attorney refused to pursue this issue. Attorneys are not required to file any and every motion that their clients want filed. Attorneys are to use their professional judgment and to pursue claims which they believe have a valid basis. You have neither alleged nor shown that your attorney was ineffective for not filing a Motion to Suppress the evidence seized based upon the search warrant. Therefore, this ground is procedurally barred.

For the aforementioned reasons, your Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Yours very truly,

T. Henley Graves

THG:baj
cc: Prothonotary
Department of Justice

²You may recall there was a Motion to Suppress filed and ruled upon by the Court concerning your statements to the police.